No. 08-488

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DARRYL BOWIE,

Petitioner,

v.

PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA and RONALD SIMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA

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QUESTIONS PRESENTED

A. Does Fed. R. Civ. P. 25(d), which mandates the substitution of a party for a public official who ceases to hold office, have any bearing on the ultimate issue of liability?

B. Can the Personnel Board be held liable through the doctrine of successor liability where the court appointed Receiver is entitled to judicial immunity and therefore is not liable?

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STATEMENT OF CASE

On July 8, 2002, Judge Lynwood Smith of the United States District Court for the Northern District of Alabama entered an Order in *United States v. Jefferson County*, 2:75-CV-666-CLS, Doc. #935 (N.D. Ala. July 8, 2002) appointing Ronald R. Sims, Ph.D. ("Sims") as Receiver of the Personnel Board of Jefferson County, Alabama (the "Order" or "Judge Smith's Order"). In addition to affording Sims "all powers vested by Act No. 248 (Enabling Act) in the three members of the Personnel Board and Personnel Director, including the power to hire, promote, demote, transfer, and remove subordinates as necessary . . ." the Order granted Sims "the status of an officer and agent of this court," and vested him, "with such immunities as by law vest with this Court." (Pet. App. B, pp. 11a, 13a).

Pursuant to the Order, the Personnel Board had no authority or control over the actions of Sims during the period of the receivership, including over the termination of Petitioner pursuant to a Reduction in Force in October 31, 2003. Petitioner filed the present action on May 20, 2005 in the District Court of the Northern District of Alabama, with Judge David Proctor presiding. The Petitioner asserted claims against Sims and the Board, alleging violations of Title VII, 42 U.S.C. § 1981, and the Fourteenth Amendment to the United States Constitution.

The Personnel Board subsequently resumed control over its operations on July 11, 2005, after the onset of this litigation. On November 14, 2005, Sims filed a motion to dismiss, asserting that he was entitled to judicial

immunity for action taken in the scope of his receivership, and that the Personnel Board was the proper defendant because he was no longer serving as Receiver. The Motion was granted on December 7, 2005, on the basis that Sims was entitled to judicial immunity and the claim against Sims in his official capacity were properly asserted against the Personnel Board.

Concurrently with this case, a substantially similar case was also pending before Judge Proctor, *Henry v. Jefferson County Personnel Board*, 2:05-CV-01788-RDP, wherein the plaintiff asserted age discrimination against the Personnel Board for her dismissal during the Receivership. The counsel for both the Personnel Board and the plaintiff was the same in *Henry* and the present case.

After the dismissal of Sims in this case, Judge Proctor heard a motion for summary judgment in *Henry*, filed by the Personnel Board, arguing that the Personnel Board could not be held liable for the acts of the Receiver. The District Court, at both parties request, stayed this proceeding pending the resolution of this potentially dispositive issue in *Henry*. On February 23, 2007, the District Court entered an Order in *Henry*, holding that the Personnel Board did not have the authority to make personnel decisions pursuant to Judge Smith's July 2002 Order, and that the Personnel Board is entitled to protection under the doctrine of "vicarious immunity," as a result of the judicial immunity afforded Sims. The Plaintiff in *Henry* appealed the District Court's decision to the 11th Circuit Court of Appeals ("11th Circuit"), and the decision was affirmed.

On April 6, 2007, in this case, the Personnel Board filed a Motion for Summary Judgment in the District Court, solely on the issue of whether the Personnel Board was entitled to immunity as it was stripped of the authority to make personnel decisions and is entitled to vicarious immunity, consistent with the 11th Circuit's decision in *Henry*. The District Court granted summary judgment on October 29, 2007, and that Order was affirmed by the 11th Circuit on May 13, 2008, and on July 11, 2008, the Petitioner's Petition for Rehearing En Banc was denied.

SUMMARY OF THE ARGUMENT

The Petitioner argues in his Petition for a Writ of Certiorari the District Court erred by declining to follow Fed. R. Civ. P. 25(d), and this failure conflicted with decisions of this Court and rulings of the Circuit Courts. This Court should decline to grant this petition, because the Petitioner has completely misstated the District Court's holding below. Rather than declining to follow Fed. R. Civ. P. 25(d), the District Court dismissed the Receiver from the action, and held that the Board was the proper party, expressly on the basis of Fed. R. Civ. P. 25(d). As he did below, the Petitioner is conflating the distinct legal concepts of the ability to be sued and liability. The District Court determined that the Personnel Board was the proper party to be sued pursuant to Rule 25(d). However, the District Court granted summary judgment for the Personnel Board based on the lack of liability. The Petitioner is attempting to create a conflict where none exists, through a mischaracterization of the District Court's opinion, and the Petition should not be granted.

Furthermore, the Petitioner's argument relating to the doctrine of successor liability ignores the dispositive issue in this case, the judicial immunity of the Receiver and the doctrine of vicarious liability. The District Court previously found the Receiver was entitled to judicial immunity based on Judge Smith's Order. In granting summary judgment, the District Court held that the Personnel Board was entitled to vicarious immunity. The vicarious immunity of the Personnel Board defeats the Petitioner's argument regarding successor liability, even if it were applicable. For this reason, the petition should not be granted.

The Petitioner finally contends the petition should be granted because the District Court's Order effectively deprived Personnel Board employees of Title VII protection during the scope of the receivership. This contention is misplaced. The District Court lacked the authority to rewrite the Judge Smith's Order, and was therefore bound to enforce the judicial immunity afforded to Sims in that Order. The proper forum to challenge Sims' judicial immunity was with the court that appointed Sims as the Receiver. The Petitioner failed to do so, and therefore cannot challenge the District Court's decision on this ground.

REASONS FOR DENYING THE PETITION

A. This Petition Should Not Be Granted Because The Petitioner Misstates The District Courts Holding Regarding Substitution of Parties, and Has Failed to Identify a Conflict Between the Circuit Courts and the District Court's Decision.

The Petitioner's primary argument for the granting of the writ is that the District Court's Order, and subsequent 11th Circuit affirmance, conflicts with holdings of this Court and the holdings of Circuit Courts in regards to the application of Fed. R. Civ. 25(d). The alleged conflict is based on his contention that the District Court declined to substitute the Personnel Board as the successor of the Receiver, as required by Fed. R. Civ. 25(d). In this, the Petitioner misstates the District Court's holdings, and misconstrues the effect of Rule 25(d) on the present action. The Court should decline to grant the petition, because the Petitioner has failed to show any conflict with prior decisions of this Court, or any other court, and has not presented a proper question for review.

As the Petitioner acknowledges, the District Court expressly referenced Fed. R. Civ. P. 25(d) in its Order dismissing Sims, the Receiver, from this suit. The court noted that, at the time of the motion to dismiss, all of the powers exercised by Sims as the Receiver had reverted back to the Personnel Board. Therefore, the court reasoned that, under Fed. R. Civ. P. 25(d), "the Board – and not Sims in his official capacity – is the proper defendant in this case." (Pet. App. B, p. 32a). Contrary to the Petitioner's contention that the District

Court declined to follow Fed. R. Civ. P. 25(d), the District Court expressly used that rule to dismiss Sims in his official capacity.

Despite this, the Petitioner attempts to show a conflict between the District Court's decision and this Court and the federal circuits, by citing thirteen (13) cases which applied Fed. R. Civ. P. 25(d). As the District Court actually applied Rule 25, in the same manner as those cited cases, the allegation of a conflict is misplaced. It is true that the practical effect of the decision by the District Court and the decisions cited by the Petitioner was different. The substituted parties in all of the cited cases were not previously involved in the litigation, and therefore needed to be added as a party pursuant to Fed. R. Civ. P. 25(d). In contrast, the Board was already a party to this litigation, and therefore the posture of the case was unchanged. However, that it is a distinction without a difference. The import of the rule, as explained by the Petitioner, "is to avoid abatement of actions against officials when they are replaced in office." (Petition, p 8). By properly substituting the Personnel Board as the proper defendant regarding the claims against Sims in his official capacity, the District Court ensured the Petitioner would have an opportunity to continue his claims against the Personnel Board. The mere fact that the Petitioner's claims against the Personnel Board failed on their merits, does not indicate that his cause of action against the Personnel Board abated.

In this respect, the Petitioner's argument evidences a misunderstanding of the effect of Fed. R. Civ. P. 25(d). The Petitioner contends that the District Court failed

to substitute the Board as the proper party *because* the District Court ultimately found that the Board could not be held liable. This is made evident in the Petitioner's statement

> "[a]lthough the district court did not explicitly give a reason for declining to follow the mandates of Rule 25(d), the reason seems to be its opinion that 'the Board cannot be liable for the actions of Sims as receiver because the Board has been stripped of any right or ability to make decisions.'"

(Petition, p. 9). As the District Court explained, the "[Petitioner] has compounded two different legal issues – the question of who may be properly named in a suit and who may be found liable." (Pet. App. B, p. 23a). The District Court, in concluding the Personnel Board could not be held liable for the acts of the Receiver, was not declining to substitute the Personnel Board as the proper party, but was instead making a proper determination of the issue of liability. In so doing, the District Court without question followed the proper procedure, by first finding the Personnel Board was the *proper party* under Rule 25(d), and then making a determination the Personnel Board was not liable for various reasons.

The fact that Rule 25(d) has no bearing on the ultimate question of liability can be demonstrated through the cases cited by the Petitioner. The common thread in all of those cases is that the courts automatically substituted the proper party, often either in a footnote or in the case style itself, and then

proceeded through a thorough analysis on the issue of liability, without reference to Rule 25(d). The District Court in the present case proceeded through the identical analysis, by first finding the Personnel Board was the proper party in regards to the claims against Sims in his official capacity, and then proceeding to conduct an analysis of the Personnel Board's liability. There is no conflict between the District Court's decision and the cases cited by the Petitioner, and instead complete unanimity. Therefore, the Petitioner has failed to provide a compelling reason for this Court to grant the petition.

B. This Petition Should Not Be Granted Because the Petitioner Has Failed to Identify a Conflict Between this Court, the Circuit Courts and the District Court's Decision And The Judicial Immunity Afforded the Receiver By Judge Smith's Order Forecloses the Application of Successor Liability.

The Petitioner also contends that the District Court failed to apply the doctrine of successor liability, in conflict with several decisions of this Court and the Circuit Courts.[1] In this, the Petitioner again misstates that grounds for the District Court's decision, and further ignores the dispositive issue in this case.

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[1] The Petitioner treats his argument regarding Fed. R. Civ. P. 25(d) and his argument regarding successor liability as one in the same, further illustrating his misunderstanding of the effect of Rule 25(d). Successor liability deals with the liability of the Board, while, Rule 25(d) only addresses the substitution of the proper party. As the two are separate and distinct concepts, they will be addressed separately.

The District Court was correct in holding that the doctrine of successor liability is inapplicable in this case, and that decision did not conflict with any other decision from this, or any other Court. Therefore this Court should not grant this petition.

In support of his contention that the District Court erred by failing to apply the doctrine of successor liability, the Petitioner cites several decisions, both from this Court, and the Circuit Courts, which he contends mandate the application of the successor liability doctrine in the present case. However, none of the cases actually stand for the proposition that the successor liability doctrine is applicable to the situation presented here. Moreover, the absence of liability on the part of Sims, pursuant to his judicial immunity, renders all of the cases factually distinguishable and therefore inapposite.

This Court's decision in *Texas and Pacific Railway Co. v. Johnson*, 151 U.S. 81, 141 S.Ct. 250, 38 L.Ed. 81 (1894) is cited by the Petitioner for the proposition that a plaintiff can pursue a claim against the successor in interest to a Receiver. In *Johnson*, the plaintiff brought a claim in Texas state court against a railroad company for a tort that occurred while the railroad was in a receivership. This Court, on review from the Texas Supreme Court, held that "as respects the contention for the railway company that a personal judgment could not be rendered against it because it was not liable for acts of negligence committed by the receiver, that was a question of general law and for the state court to pass upon." *Id.* at 255. Rather than providing a rule that a successor must be held liable for the acts of the receiver,

the *Johnson* Court declined to reverse a state supreme court on a state law issue. This case is not informative in any way of the issues presently before this Court.

Similarly, *Rowser v. Miller*, 631 F.2d 433 (6th Cir. 1980), also cited by the Petitioner, fails to give support for the Petitioner's proposition. In *Rowser*, the 6th Circuit Court of Appeals reviewed a district court's dismissal of an action, alleging racial discrimination on the part of a hotel's receiver, on the ground that the claims were frivolous. During the pendency of the appeal, the receivership was dissolved, and the receiver argued that the case was now moot. The Court in *Rowser* reversed the District Court's determination that the claim was frivolous, noting the severity of the allegation. The court noted that "[i]t is not clear, however, whether the termination of a receivership altogether precludes further recourse on claims arising during the receivership." *Id.* at 434. The court remanded the case for further proceedings to resolve that question. This case does not support the proposition that successor liability applies when a receivership dissolves.

None of the other cases cited by the Petitioner even address the applicability of the successor liability doctrine to the dissolution of the receiver, and instead deal with the unrelated issue arising when the successor company buys the assets of the predecessor and continues its operations. See *EEOC v. MacMillan Bloedel Containers, Inc.* 503 F.2d 1086 (6th Cir. 1974); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 94 S.Ct. 414, 38 L.Ed.2d 388 (1973); *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974); *Trujillo v. Longhorn*

Mfg. Co., 694 F.2d 221 (10th Cir. 1982); *Dominguez v. Hotel, Motel, Restaurant & Miscellaneous Bartenders Union*, 674 F.2d 732 (8th Cir. 1982). These cases are therefore inapplicable to the present action, where the actions were taken by a Court appointed Receiver, who subsequently returned control back to the Personnel Board. As none of the cases cited present any conflict with the District Court's opinion, the Petition should not be granted.

Moreover, none of the cases Petitioner cites address the dispositive issue of this case, which is the judicial immunity granted to Sims by Judge Smith's Order. The Order appointing Sims as Receiver of the Personnel Board granted Sims "the status of an officer and agent of this Court," and vested him "with such immunities as by law vested with this Court." (Pet. App. B, p. 13a). Thus, under the Order, Sims was afforded absolute judicial immunity for his decisions made in the scope of his Receivership. The District Court, in dismissing Sims from the Petitioner's lawsuit, noted that "[u]nless Sims acted outside the scope of his appointed jurisdiction, judicial immunity applies." (Pet. App. C, p. 34a). The liability of the predecessor in all of the cases cited by the Petitioner had yet to be determined. The District Court in the present case conclusively established that Sims was immune from the suit.

In addressing the Petitioner's argument regarding successor liability, the District Court noted the effect of its previous finding of Sim's judicial immunity; "Successor liability cannot lie where there is no underlying liability. As this Court has previously found Dr. Sims is not liable for Mr. Bowie's claims, the

Personnel Board cannot be the successor to liability which does not exist." (Pet. App. B, p. 24a). Thus, even if those cases stood for the proposition for which they are cited, they are all readily distinguishable, as the judicial immunity of Sims foreclosed the application of the successor liability doctrine. Because the Petitioner has failed to identify any authority with which the District Court's decision conflicts, the Petition should be denied.

C. The Petition Should Not Be Granted Because The District Court Based its Decision in Part on the Adequate and Independent State Law Ground of Vicarious Immunity.

The Petitioner contends the District Court based its decision on the ground that "the Board cannot be held liable for the actions of Sims a receiver because the Board has been stripped of any right or ability to make decisions." (Petition, p. 9). However, that was only one of the grounds the District Court relied upon to hold the Personnel Board was not liable for the acts of the Receiver. As a separate adequate and independent ground, the District Court also held that "the Board is also due the protection of 'vicarious immunity' under Alabama law as an extension of the immunity bestowed on Sims by Judge Smith's Order." (Pet. App. B, p. 19a).

The District Court made clear this was a separate and sufficient ground for granting summary judgment, when it stated "whether that lack of liability arises out of the simple fact that the Board had no power to – and did not – take the actions of which the Plaintiff complains, or whether the Board, as an extension of

Sims' judicial immunity, is due vicarious immunity, there is simply no basis to hold liable and entity that was not responsible for the decisions at issue in this case." (Pet. App. B, p. 24a). Because the District Court also based its decision on application of an adequate and independent state law ground, this Court should decline to grant the Petition. See *City of Mesquite v. Aladdin's Castle Inc.*, 455 U.S. 283, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982) (declining to reach decision on federal issue because Texas law might provide adequate and independent support for the judgment of the Court of Appeals.)

D. The Petitioner's Argument Asserting the District Court Deprivated the Petitioner Of Title VII Protection Is In Effect An Argument That A Court Appointed Receiver Is Not Entitled To Judicial Immunity, And As Such, Conflicts With Over A Century Of Precedent And Was Not Brought In The Correct Forum.

Petitioner's final argument to this Court is that the practical effect of the District Court's Order was to deprive the employees of the Personnel Board of Title VII protection during the course of the Receivership, and therefore this case "presents an issue of great national importance." (Petition, p. 21) However, as previously established, the grant of judicial immunity to Sims as Receiver mandated the District Court's decision, and the District Court was bound to enforce Judge Smith's Order as it was written. In effect, by asking this Court to reverse the District Court, the Petitioner is asking this Court to reverse the appointing court's grant of judicial immunity to a court appointed

receiver, and by doing so, overturn a number of substantially similar Circuit Court precedents.

Nearly all of the Circuits acknowledge that a court appointed receiver is entitled to judicial immunity. *Property Management Investments, Inc. v. Lewis*, 752 F.2d 599, 602 (11th Cir. Fla. 1985) (affirming dismissal of Receiver on the ground of judicial immunity); *NPF IV, Inc. v. Servicemaster Diversified Health Servs., L.P.*, 181 F.3d 102 (6th Cir. 1999) (affirming dismissal of Receiver on ground of judicial immunity); *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1301 (9th Cir. 1989) (finding that "absolute derivative judicial immunity is appropriate" for court appointed receivers); *Bradford Audio Corp. v. Pious*, 392 F.2d 67, 71 (2d Cir. N.Y. 1968) ("A court appointed receiver is a quasi-judicial officer within the protection of the immunity.") *Davis v. Bayless, Bayless & Stokes*, 70 F.3d 367, 373 (5th Cir. Tex. 1995) ("Court appointed receivers act as arms of the court and are entitled to share the appointing judge's absolute immunity") *T & W Inv. Co. v. Kurtz*, 588 F.2d 801, 802 (10th Cir. Okla. 1978) ("The courts that have considered the matter have held that a receiver is a court officer who shares the judge's immunity.") *Kermit Constr. Corp. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. P.R. 1976) ("At the least, a receiver who faithfully and carefully carries out the orders of his appointing judge must share the judge's absolute immunity.") Clearly, the concept of a court appointed receiver receiving judicial immunity is not novel. The Petition, a request for the Court to upend a rule of law consistently applied in nearly all of the Circuits, should therefore not be granted.

Finally, the proper forum in which to challenge the actions of the Receiver, and whether the Receiver exceeded his grant of authority, is with the Judge Smith, the appointing judge. In *New Alaska Dev. Corp.*, *supra*, the 9th Circuit Court of Appeals held, in regard to issues of whether a Receiver was negligent in his management, the Petitioner should have addressed those issues with the appointing judge. The court noted that "it constitutes a waste of precious judicial and party resources to pursue matters such as these in a collateral proceeding, rather than before the judge who appointed the receiver." In the related context of a bankruptcy receiver, the court in *In re Sundance Corp.*, 149 B.R. 641, 648 (Bankr. E.D. Wash. 1993), similarly queried "Who better can determine if a receiver acted beyond the scope of its authority than the court that granted that authority?" Rather than challenging the Receiver's action and the scope of his authority with the appointing judge, the Petitioner in effect asked the District Court to rewrite the appointment order, eliminating the Receiver's judicial immunity, which the District Court lacked the authority to do.

CONCLUSION

The Petitioner's attempts to provide a compelling reason for the grant of its Petition for Writ of Certiorari all fail. The Petitioner has not shown that there exists any conflict between the decision of the District Court, and its affirmance by the 11th Circuit. In fact, the District Court's decision is in complete accord with all of the cases cited by the Petitioner. Furthermore, the Petitioner misrepresents the holding of the District Court in his petition, and ignores the dispositive issue of the case. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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